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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

Michelle M. Etlin, Petitioner,

v.

Vladimir N. Etlin, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

Michelle M. Etlin, pro se
3009 Military Rd. NW
Washington, D.C. 20015

March 14, 1989

70 pp

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The Petitioner, Michelle M. Etlin, pro se, respectfully prays that a writ of certiorari issue to the review the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia entered in this proceeding on December 14, 1988.

QUESTIONS PRESENTED

1. Can a state satisfy the jurisdictional requirement of "significant connections" and "substantial evidence" as those terms are used in the Uniform Child Custody Jurisdiction Act, if the child

has not lived in that state for more than six years? Can 28 U.S.C. 1738A confer subject-matter jurisdiction on the courts of a state which lacks a statutory basis for such jurisdiction in its own law?

2. Can a state refuse to review a conviction for criminal contempt because of its insistence on a procedural rule which serves no legitimate state interest and is applied in a discriminatory manner? Can a Court use contempt powers to create a new class of laws, infractions against which are punished without resort to Constitutional protection for the accused?

PARTIES TO THE PROCEEDING

Appellant: Michelle Etlin, pro se
3009 Military Road NW
Washington DC 20015
(hereinafter called "Mother")

Appellee: Vladimir Etlin
7403 Lisle Avenue
Falls Church, VA 2043
(hereinafter called "Father")

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21.1(d) - There are no official or unofficial reports of the opinions delivered in the courts below.

JURISDICTION

This Court may take jurisdiction under 28 U.S.C. 1257(3).

The Fairfax County Circuit Court entered a final order on March 25, 1987. The Intermediary Court of Appeals of Virginia affirmed on April 24, 1988, and denied application for rehearing on June 24, 1988. The Supreme Court of Virginia denied the petition for review on December 14, 1988. This Court has jurisdiction because: (i) The Supreme Court of Virginia denied review on December 14, 1988; and (iv) this Court has jurisdiction under 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1738A (the "PKPA")

provides, in pertinent part:

"(c) A child custody determination made by a court of a State is consistent with the provisions of this Section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child ...;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and ... at least one contestant, have a significant connection with such state... and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; ... or ***

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section. ***

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

VA CODE Section 20-126 provides, in pertinent part:

§20-126. Grounds for Jurisdiction.--A. A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

1. This State (i) is the home state of the child ...; or

2. It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and ... at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

==========

VA CODE Section 20-135 provides, in pertinent part:

§20-135. Res Judicata effect of custody decree.--A custody decree rendered by a court of this State which had jurisdiction under §20-126 ...is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this chapter.

Article III, Section [3] of the U.S. Constitution provides:

> "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed:..."

==========

Article IV, Section 2.[1] of the U.S. Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

==========

The Eighth Amendment to the U.S. Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

==========

The Fourteenth Amendment to the U.S. Constitution, Section 1 provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

==========

VA Code Section 19.2-318 provides, in pertinent part:

> "19.2-318 Appeal on Writ of Error to Judgment for Contempt.- ... A writ of error shall lie from the Court of Appeals to a judgment for criminal contempt of Court. This section shall also be construed to authorize an appeal from or writ of error to a judgment of a circuit court rendered on appeal from a judgment of a district court for civil or criminal contempt."

STATEMENT OF THE CASE

This Court has seen Etlin v. Etlin four times in the past upon petitions from the father.

Vladimir and Michelle Etlin married in New York in November, 1976 and had a child, Daniel Etlin, on January 20, 1978 in Virginia. They separated in 1980.

Mother and Father agreed to have custody of Daniel decided by a child psychiatrist pursuant to an order of the Juvenile Court dated March 25, 1980, but Father refused to abide by the arbitration decision and sued for custody. Dur-

ing the pendency of proceedings in the Juvenile and Circuit Court, Mother and Daniel moved to Maryland on November 1, 1980. The Fairfax County Circuit Court, per Judge Lewis Hall Griffith, awarded permanent custody of Daniel to Mother by final order entered on February 26, 1981. [Appendix 20-25].

Father sued Judge Griffith in the federal district court in April, 1981 claiming discrimination, and promptly moved the judge to recuse based on the lawsuit. [Appendix 26-27]. That lawsuit was dismissed by the district court and appealed to the Fourth Circuit, which dismissed. He appealed to this Court, which denied certiorari.

Judge Griffith recused because of the lawsuit, but the custody order was incorporated in the final decree on February 12, 1982. Father appealed it to the Virginia Supreme Court, which

refused to review it; he appealed it to this Court, which denied certiorari.

Father then returned to the Circuit Court filing a "motion to set aside court order" for "fraud on the court." [Appendix 27-29]. The parties came before the Court, per Judge F. Bruce Bach, on June 1, 1982 on the mother's motion for enforcement and the father's motion to relitigate custody. Finding no fraud, the court nevertheless set aside Judge Griffith's order and re-tried custody de novo, making his own decision on June 2, 1982 but not signing or entering a final order. [Appendix 29-30].

On September 4, 1982, Mother and Daniel moved away from Maryland leaving no forwarding address. No process was outstanding against Mother at that time, and no injunction or ne excheat order prevented her free movement. When Father realized Mother had moved, he made a

"motion to change custody" which did not comply with the UCCJA's requirements, and served on Mother's prior attorney a rule to show cause why Mother should not be held in contempt. At an ex parte hearing on October 15, 1982, the Court held the Mother in contempt and awarded sole custody to the Father. [Appendix 30-32].

Father requested that the Commonwealth Attorney draw a felony warrant for Mother's arrest, but he declined on the basis that she had not committed a felony in Virginia. Father brought a mandamus proceeding to force the prosecutor to draw a warrant, but he lost, appealed it to the Virginia Supreme Court, which did not grant review; he appealed the mandamus to the this Court but certiorari was denied.

Meanwhile, Mother had been forced to assign her judgments for unpaid child support to the last attorney she had in

Virginia. This lawyer brought garnishment proceedings to collect his fees. Father moved to set aside garnishments, and when denied he appealed. The Supreme Court of Virginia refused review. He appealed to this Court, which denied certiorari.

In 1985, 2-1/2 years after the act complained of, Judge Bach issued a bench warrant for Mother's arrest for criminal contempt, setting $10,000 bond. [Appendix 32-34].

Father had Daniel's picture shown on the Phil Donahue Show as a missing child and as a result located Mother and Daniel in Portland, Oregon in 1986. He sought to have the 1982 ex parte order enforced there. Mother's lawyer pointed out that it was made without statutory notice and was therefore unenforceable. While proceedings were pending, Father physically kidnapped Daniel, taking him to Virginia.

The Virginia court immediately assumed jurisdiction and did the following: (1) it assigned the Department of Social Services to investigate Daniel's welfare but then terminated their investigation and refused to honor their request to appoint a guardian ad litem; (2) it placed Daniel in his father's custody without an examination of parental fitness; (3) it jailed Mother and revoked her bond before trying her for contempt [Appendix 34]; and (4) it held a mixed contempt/custody trial after which it made a punitive custody award to Father and sentenced Mother to 12 months in jail for criminal contempt. [Appendix 11].

Mother's counsel argued that the Virginia Court should not exercise jurisdiction in a hearing before trial on February 20, 1987, but the Judge refused to consider the motion and announced his intention to assume jurisdiction, in a

colloquoy in which the considerations of the UCCJA were not referenced:

COUNSEL: ...I have to file a motion asking you to--under section 20-130 of the Code of Virginia--to defer jurisdiction back to Oregon. Are you ruling on that?

COURT: I'm denying that.
COUNSEL: You deny that motion?
COURT: I don't think Oregon has any jurisdiction over this. ... There have been literally 10, 20, 30 hearings in this court, and there's no way that Oregon
COUNSEL: (Interposing) Your Honor, probably more.
COURT: Yes, probably more. This is the court that's going to hear it. I know these people. I'm going to decide it.

(Transcript February 20, 1987, p. 14)

* * * *

COUNSEL: I would reiterate to you that the child has not lived in this state since 1980, since October 31, 1980; when Judge Griffith awarded custody, he'd been gone from the state about 3 months ... and that when you heard custody in June of '82, he'd been gone however long and so forth and so on. And I would reiterate that the moving party in all of these litigations has been Mr. Etlin who has kept the wheels churning. And I'll stand on my brief for the rest of my argument, including the observations about Sections 20-132, 20-148 [sic], 20-130 and

20-125 [sic], all sections of the Uniform Child Custody Jurisdiction Act adopted in the state.

* * *

COURT: Well, I think the Fairfax County, Virginia Circuit Court is the appropriate jurisdiction to hear it, and I don't think it's even a close question. I think it's the only jurisdiction that has any business at all hearing it. * * * and as far as I know, there's nothing in [the UCCJA] that even remotely indicates that Oregon, under these circumstances, should have custody, or should have jurisdiction over that case.

Transcript, March 12, 1987, pp. 121-124.

COURT: ... Let me say this, too. I also feel, ... I also believe in my heart and soul, that this ... needs to be decided, and I frankly don't think that the Oregon judge, who was very peripherally involved in this thing, or any other judge, is in nearly the position I am to decide this case for the best interest of this child.

Transcript, March 12, 1987, p. 125.

Mother appealed from that order on three grounds: (1) her contempt conviction was improper because the statute of limitations for contempt passed, all acts

complained of had taken place outside the Commonwealth, and because she was held in criminal contempt of an order which contained no injunction or specific command; (2) the court did not, under Virginia law, have jurisdiction to decree as to the custody of Daniel there was no evidence in Virginia upon which to decide custody; and (3) the trial court made a punitive custody award contrary to the best interests of the child and the law of Virginia.

The Court of Appeals refused to consider the contempt conviction because appeal was not brought by writ of error. It affirmed the trial court, opining that the Commonwealth had jurisdiction pursuant to 20-126(b) ("significant connections") [Appendix 15].

Mother applied to the Court of Appeals for reconsideration on three theories: (1) caselaw in Virginia provides

that review by appeal rather than writ of error is, at worst, "inadvertence" and cannot deprive a petitioner of review of criminal contempt conviction; [Appendix 35]; (2) the merging of a custody and contempt trial is a prima facie showing that the custody decree rendered was punitive; and (3) since Virginia had derogated the PKPA by proceeding without compliance with the Act, it could not presume to "continuing jurisdiction" under the PKPA. [Appendix 38-41]

> "Had the trial court ever given consideration to the requirements of the UCCJA [starting in 1982], including Section 20-126(A)(2), and Section 20-135, none of the latter events of this case, including the mother's desperate escape, would have occurred. It is simply unjust to resort to the UCCJA to confirm and justify the actions of a judge whose casual disregard of the Act was the original element that threw the case out of control."

Mother's Petition for Rehearing to the Court of Appeals, April 17, 1988, pp. 16-17.

The Court of Appeals denied rehear-

ing and refused to consolidate Mother's appeal with appeal of the order Judge Bach finally signed in 1988 nunc pro tunc 1982. Mother petitioned the Supreme Court of Virginia for review. Among other assertions, she brought up the fact that the application of the procedural bar to her right to review of criminal contempt conviction had been applied in the Commonwealth in a discriminatory manner, because other criminal contempt defendants' convictions were reviewed by means of appeal. [Appendix 38] She gave oral argument pro se before a writ panel on December 12, 1988; on December 14, 1988 her petition for review was denied. [Appendix 19]

Meanwhile, the custody decision Judge Bach made on June 2, 1982, of which he held Mother in contempt on October 15, 1982, for which he jailed Mother on February 18, 1987; and which he signed on

March 4, 1988; is presently on appeal before the Court of Appeals of Virginia.

Mother also moved the trial court to vacate its ex parte order dated October 26, 1982 because she was never served with notice of the hearing. The trial court refused to hear Mother's motion when it was served and filed, so Mother brought a petition before the Court of Appeals of Virginia to mandate the trial court to vacate that order. The court has demurred and that petition also remains pending.

FEDERAL QUESTIONS PRESENTED BELOW

The question of whether Virginia had subject matter jurisdiction under the significant connections test was first addressed to the trial court in a pre-trial memorandum of law [Appendix 36-37], then briefed to the Court of Appeals and the Supreme Court of Virginia. [Appendix 37-41].

The question of abuse of the contempt powers of a court of the Commonwealth was first raised in the trial court upon oral argument [Appendix 41] and then briefed to the Appellate Court [Appendix 15, 35] and Supreme Court of Virginia [Appendix 38].

REASONS TO GRANT THE PETITION

I. IN DEROGATION OF THE UNIFORM ACT AND THE FEDERAL ACT, VIRGINIA HAS EXERCISED JURISDICTION WITHOUT A STATUTORY BASIS FOR DOING SO.

A. Background of Statutory Scheme Conferring Jurisdiction.

Jurisdiction can only be acquired pursuant to statute; it cannot be presumed or assumed under the common law. Two statutes describe the prerequisites for jurisdiction to hear child custody disputes (continuing or original) in Virginia, as in all other states: the Uniform Child Custody Jurisdiction Act, or the UCCJA (VA Code 20-125 et seq.) and

the Parental Kidnapping Preventing Act, or the PKPA (28 U.S.C. 1738A). (The UCCJA is sometimes referred to herein as the Uniform Act and the PKPA is sometimes referred to as the Federal Act.)

The National Conference of Commissioners on Uniform State Laws and the American Bar Association promulgated the UCCJA in 1968 to bring order to chaos. In spite of this, 12 years later,

> "a number of states refused to enact the UCCJA while others enacted it with modifications. In the absence of uniform national standards for allocating and enforcing custody determinations, noncustodial parents still had reason to snatch their children and petition the courts of any of a number of haven states for sole custody." Thompson v. Thompson, 108 S.Ct. 513, 517 (1988)

In addition to "haven states," there were loopholes. One was the use of the "significant connections/substantial evidence" test (the "SCSE Test") to allow a court to take jurisdiction over custody of a child who had lived else-

where for a long time. Under the provisions of the UCCJA, the two tests (home state or SCSE) were simply alternative, and neither was given preference. The Commissioners and other commentators generally agreed that the SCSE Test should not be used to excess by courts eager to justify jurisdiction. See Ratner, "Procedural Due Process and Jurisdiction to Adjudicate," 75 Nw.U.L.Rev. 363, 392 (1980). But this Court never granted certiorari on the subject.

On December 28, 1980, the PKPA, 28 U.S.C. 1738A, was signed into law. It was meant to end the confusion and induce compliance with the UCCJA. According to this Court, the PKPA amounted to "Federal adoption of key provisions of the UCCJA for all states," Thompson, supra, at 517. The PKPA closed a loophole: it set out in identical language the jurisdictional prerequisites of the

UCCJA, with one difference: it prescribed the home state test for jurisdiction as preferred, and allowed the use of the SCSE Test only as an alternative if there was no home state.

In two other divisions, however, it did not end confusion but perhaps created it. This Court has dealt with the first great misinterpretation that arose from the Federal Act: in its recent decision in Thompson v. Thompson, 798 F.2d 1547 (9th Cir), 108 S.Ct. 513, supra, it affirmed the Ninth Circuit's opinion that the PKPA was not meant to give rise to a private federal cause of action.

What was the PKPA designed to do? It was designed to cause the States to comply with the UCCJA and to vest full faith and credit in those custody orders which did comply with it. The Federal Act, rather than giving rise to federal litigations, was meant to regulate state

court litigations and cause the several States to judiciously comply with their own uniform laws. Again, relying upon this Court's analysis, "the PKPA is a mandate directed to state courts...." Thompson, supra, at 518.

The way the PKPA sought to induce compliance with the UCCJA was twofold: (1) it accorded full faith and credit to custody decrees, but only to those custody decrees which were made in compliance with the PKPA--i.e., only with those custody decrees which followed the dictates of the UCCJA, while elevating home state over significant connections as a basis for jurisdiction; and (2) it set up continuing jurisdiction in a state which had already made a decree (the "Decree State"), again only if that state maintained jurisdiction under its law. As of 1986, all of the 50 states had adopted the UCCJA, the PKPA allows

Decree State modification jurisdiction only if the state maintains jurisdiction under the UCCJA.

B. "Jurisdiction Forever"

As if to complement the misunderstanding about the PKPA opening the doors of federal courthouses to custody trials, another common idea developed which was basically an oversimplification of the Federal Act. It was commonly believed that the Decree State retained the right to make all modification decrees as long as one parent still lived there (the "Jurisdiction Forever Rule").

This would remove from the Decree State the necessity to comply with the UCCJA with respect to modification decrees, an effect which is plainly adverse to the intentions of the PKPA. (It could also encourage punitive custody awards and relitigations contrary to the intent of both Acts.)

The Jurisdiction Forever Rule ignored this logical inconsistency, assuming that conflict between the UCCJA and PKPA was not incongruous and pointing out that when the two acts were in conflict, the PKPA would govern because of federal preemption.

This interpretation, however, does not fit a careful and faithful reading of the law which was actually written. It assumes that the legislators not only meant what they didn't say, but meant something a lot simpler and easier to write than the law they passed. (It rests on the notion that the legislators went out of their way to write something more complicated than what they really meant!) It represents a pragmatic application of the law which is actually contrary to its provisions. In pertinent part, the law reads:

> "(c) A child custody determination made by a court of a State is con-

sistent with the provisions of this Section only if--

(1) such court has jurisdiction under the law of such State; and ***

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the re-quirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

Subsection (d) does not say that the Decree State's jurisdiction continues so long as one parent remains in that state. In addition, the requirement of Subsection (c)(1) must continue to be met. Subsection (c)(1) requires the court to have jurisdiction under the law of such state. In the case of every single state now, that is the UCCJA. In Virginia in 1987, that was the UCCJA as adopted by Virginia, that is, 20-125 et seq.

This Court has already recognized that the PKPA confers continuing jurisdiction subject to conditions; in Thompson, supra, the Court says:

> "The sole exception to this [continuing jurisdiction of Decree State] occurs where the first State either has lost jurisdiction or has declined to exercise continuing jurisdiction." Id. at 515.

So the formula set forth by the PKPA is a circular test which incorporates and reiterates the UCCJA's jurisdictional requirements. There is no conflict; the Federal Act encourages and depends upon compliance with the Uniform Act.

In 1987, Daniel was nine years old. He had moved away from Virginia with his custodial parent on November 1, 1981 at the age of less than three years old, never having attended school in Virginia. His doctors, teachers, activities and friends, acquaintances, religious activities, and home were elsewhere. Virginia lacked jurisdiction to hear a modification custody petition.

C. "Significant Connections"

In fact, the trial court did not pretend there was substantial evidence

in Virginia in 1987; the Judge openly stated that his reason for exercising jurisdiction was that there had been plentiful litigation in the Commonwealth. [Supra, p. 7] (Taking into account that one of the main purposes of the UCCJA is to reduce custody litigation, Elder v. Park, App. 1986, 717 P.2d 1132, 104 N.Mex. 163, this would seem to disqualify, not qualify, Virginia to hear the case.)

WHAT ARE SIGNIFICANT CONNECTIONS?

"Significant connections" can be defined in any number of ways. However, it is obvious that "significant connections" does not mean simply and solely that the court made a decree in the past. Although many states have described the SCSE Test, and although Virginia itself applied it in Middleton v. Middleton, 1984, 314 S.E.2d 362, 227 Va. 82, it remains an area prone to abuse and its de-

finition lacks sufficient particularity for uniform application by the several states. Again, the states decide these issues in different ways on different days. Some examples follow.

The fact that Florida had made the original decree and a subsequent modification did not constitute "sufficient connections," where the children had lived with their custodial parent in New York for three years, and only the non-custodial parent lived in Florida. Matteson v. Matteson, Fla. App. 2 Dist.1980, 379 So.2d 677. But cf. Meier v. Davignon, 1987, 734 P2d 807, 105 NM 567.

Visitation with a non-custodial parent by a child who lived in a sister state did not establish jurisdiction. Bills v. Murdock, 1982, 654 P.2d 406, 232 Kan. 237. But cf. In re Marriage of Panich, Mo. App. 1984, 672 SW2d 718.

Jurisdiction could not be asserted

where, prior to filing of the petition for modification, New Mexico was not the children's home state, and the only connection of the children to the state was their father. Trask v. Trask, App. 1986, 727 P.2d 88, 104 NM 780. But cf. William L. v. Michele P., 1979, 416 NYS2d 477, 99 Misc.2d 346.

Visitation with the non-custodial parent was not enough connection to establish jurisdiction. Gomez v. Gomez, 1982, 446 NYS2d 127, 86 A.D.2d 594, aff'd. 452 NYS2d 13, 56 NY2d 746, 437 NE2d 272, stay denied 453 NYS2d 684, 56 NY2d 1028, 439 NE2d 399. But cf. SJ v. LT, Alaska 1986, 727 P2d 789.

Although the father had a significant connection with New York, the child had no connection other than a brief residence prior to commencement of the action. Sullivan v. Sullivan, 1982, 451 NYS2d 851, 87 AD2d 42, aff'd. 458 NYS2d

516, 58 NY2d 642, 444 NE2d 980. But cf. Houtchens v. Houtchens, R.I. 1985, 488 A.2d 726.

Although a child born in New Jersey had visited her father in New Jersey after moving away from the state with her custodial mother, the child had no substantial connection with New Jersey; New Jersey lacked jurisdiction over custody. LF v. GWF, 1982, 443 A2d 751, 183 NJ Super. 195. But cf. Dykes v. Dykes, Fla. App. 5 Dist. 1981, 395 So.2d 188.

On a petition for modification, evidence was insufficient to establish "significant connections" if the children were only in the state for visitation. Mattleman v. Bandler, 1983, 461 A2d 561, 123 NH 368. But cf. Hofer v. Agner, Fla.App.Dist. 1979, 373 So.2d 48.

The state in which the mother resided and which had made the original custody decree lost its preexisting juris-

diction where the children's only remaining connection was visitation with their non-custodial mother. Olson v. Olson, 1985, 494 A2d 737, 64 Md. App. 154. But cf. Joseph EH v. Jane EH, 1980, 423 A.2d 739, 283 Pa. Super. 109.

New York lacked jurisdiction to decree concerning custody where the children had not lived in New York for five years and their only connection was their father's visitation rights. Swire v. Swire, 1983, 494 A.2d 1035, 202 N.J. Super. 189. But cf. Reeve v. Reeve, Fla. App. 1 Dist.1980, 391 So.2d 789.

The Court of Appeals of Virginia did not explain what the basis of the significant connections might have been. A concept as crucial as substantial evidence about a child's welfare should be defined plainly. If definition of such a crucial term is left only to trial court discretion, the UCCJA's and PKPA's goal

of limiting, rather than proliferating, jurisdiction (Hart v. Hart, 1985, 695 P.2d 1285, 236 Kan. 856) is not served.

Of course, this Court requires an explanation of why definition of "significant connections/substantial evidence" and/or clarification of the "continuing jurisdiction" provisions of the PKPA are important federal issues. The answer is that regulation of interstate jurisdictional activity is obviously a federal issue; otherwise there would be no Uniform Act and no PKPA. Yet now, the essential reasoning behind the Uniform Commissioners' work and the Wallop Amendment can be evaded by the "Jurisdiction Forever Rule" coupled with a fast and loose interpretation of "significant connections" and "substantial evidence"--such as that adopted by the trial court in Etlin v. Etlin and allowed to proceed uncorrected through the highest Court of

the Commonwealth of Virginia.

D. The Federal Issue Presented

Since the decision in Thompson, supra, the Supreme Court of the United States has told the fifty states what the PKPA does not do. Petitioner asks this Court to continue the process, grant certiorari, and tell the several states what the PKPA does do.

THE STATES ARE DIVIDED AND CONFUSED

Can a Forum State ever modify the decree of its sister state if a non-custodial parent remains behind and invokes the continuing jurisdiction of the decree state? In the face of conflicting definitions and widely divergent interpretations, the several states have come down on both sides of the question.

SAYING ONLY THE DECREE STATE RULES: Clarke v. Clarke, 1985, 496 A.2d 361, 126 N.H. 753; Mark L. v. Jennifer S., 506 NYS2d 1020, 133 Misc.2d 454 (N.Y. 1986);

Enslein v. Enslein, N.Y.A.D. 2d Dept. 1985, 492 NYS2d 785; Walsh v. Walsh, 458 NYS2d 835, 117 Misc.2d 815 (1983); S. Frederick P. v. Barbara P., 454 NYS2d 202, 115 Misc.2d 332 (1982); Schoeberlein v. Rohlfing, Minn App 1986, 383 NW2d 386; State ex rel Valles v. Brown, 639 P2d 1181, 97 NM 327 (1981); Ingram v. Ingram, 463 So.2d 932 (La. App. 2d Cir. 1985); Wheeler v. Buck, 452 So.2d 864 (Ala. Civ. App. 1984); O'Daniel v. Walker, 686 SW2d 805, 14 Ark. App. 210 (1985); McDougald v. Jenson, C.A. 11 (Fla) 1986, 786 F.2d 1465, cert den 107 S.Ct. 207; Heartfield v. Heartfield, C.A.Tex 1985, 749 F.2d 1138; Kumar v. Santa Clara County Superior Court, Cal. App. 1981, 177 Cal. Reptr. 763; Bahr v. Bahr, 442 NYS2d 687, 108 Misc.2d 920, aff'd 458 NYS2d 247, 91 AD2d 1010 (1981); Tufares v. Wright, 644 P2d 522, 98 NM 8 (1982); In re McBride, Ala. Civ.

App. 1985, 469 So.2d 645; Applegate v. Gant, 460 So.2d 1293 (Ala. Civ. App. 1984); Flannery v. Stephenson, 416 So.2d 1034 (Ala. Civ. App. 1982); Evans v. Evans, 668 F.Supp. 639 (M.D. Tenn 1987); Garrett v. Garrett, 732 SW2d 127 (Ark. 1987); Yacco v. Durley, 457 NYS2d 384, 117 Misc.2d 69 (1982); Department of Human Services v. Avinger, 721 P.2d 781 (NM App 1985); Belosky v. Belosky, 640 P.2d 471, 97 NM 365 (1982); Marks v. Marks, 315 SE2d 158 (S.C. App. 1984); In re Fox, App 2 Dist. 1986, 225 Cal. Reptr. 823, 180 C.A. 3d 862, rev den; Jefferson v. Downs, 436 NYS2d 169, 107 Misc.2d 852 (1981) to name a few.

SAYING THE FORUM STATE MAY RULE: Voninski v. Voninski, 661 SW2d 872 (Tenn App. 1982); Debra S. v. Roger S., NYS 2d 723, 116 Misc.2d 264 (1982); Mebert v. Mebert, 444 NYS2d 834, 111 Misc.2d 500 (1981); Leslie F. v.Constance F., 441

NYS2d 911, 110 Misc.2d 86 (1981); Virginia E. E. v. Albert S.P., 440 NYS2d 979, 110 Misc.2d 448 (1981); In re Marriage of Leyda, 398 NY2d 815 (Iowa, 1987); Snow v. Snow, Minn App. 1985, 369 NW2d 581; Dennis v. Dennis, 366 NW2d 474 (ND 1985); Quenzer v. Quenzer, 653 P2d 295, cert den 103 S.Ct. 1436, 460 US 1041, 75 L.Ed.2d 794; Ziegler v. Ziegler, 691 P.2d 773, 107 Idaho App. 527 (1984); Arbogast v. Arbogast, 327 SE2d 675 (W.V. 1984) (holding that a custody decree not made in compliance with the PKPA could not vest continuing jurisdiction in the decree state); Nielsen v. Nielsen, 472 So.2d 133 (La. App. 5 Cir. 1985); Wachter v. Wachter, 439 So.2d 1260 (La. App. 5 Cir. 1983) (holding that the Decree State could not make an order consistent with the provisions of the PKPA while it was not the child's home state); Boyd v. Boyd, 653 SW2d 732 (Tenn App 1983); In re

Custody of Thorensen, 730 P2d 1380, 46 Wash. App. 493 (1987); In re Custody of Dunn, 701 P2d 158 (Colo. App. 1985) (holding it was abuse of discretion for the court in the forum state to automatically reject jurisdiction in favor of the decree state!); In re Reynolds, 441 NE2d 1141, 2 Ohio App 3d 309, 2 OBR 341 (1982); Alexander v. Ferguson, 648 F. Supp. 282 (D. Md. 1986); Serna v. Salazar, 651 P.2d 1291, 98 NM 648 (1982); Walker v. Frericks, 328 SE2d 126, 285 S. Car. 139 (App. 1985); Berry v. Berry, 466 So.2d 138 (Ala. Civ. App. 1985); Pierce v. Pierce, 640 P.2d 899, 197 Mont. 16 (1982); Middleton v. Middleton, 314 SE2d 362, 227 Va. 82 (1984); Clark v. Kendrick, 670 P2d 32 (Colo. App. 1983); Herrero v. Matas, 447 So.2d 335, rev dismissed 453 So.2d 44 (Fla App 3 Dist 1984); Matter of T.C.M., 651 SW2d 525 (Mo App 1983); Fielder v. Thorn, 525 A.2d 576

(De. Fam Ct. 1987); Slidell v. Valentine, 298 NW2d 599 (Iowa, 1980) (holding that there must be "reasonable time limits" to the continuing jurisdiction of the decree state); Sinclair v. Albrecht, 336 SE2d 485, 287 S.C. 20 (App. 1985); Kioukis v. Kioukis, 440 A2d 894, 185 Conn. 249 (1981) (holding that when the connections with the decree state become slight, the forum state should take over); Bergh v. Bergh, 387 NW2d 213 (Minn App 1986); Wagner v. Wagner, 482 So.2d 780, writ den 487 So.2d 441 (La. App. 4 Cir. 1986); Olivia H. v. John H., 497 NYS2d 838, 130 Misc.2d 756 (1986); to name a few.

Even in the face of the voluminous and detailed statutory and caselaw, perhaps because of the voluminous and detailed statutory and caselaw, the several states are still unsure how to proceed; each case is a roll of the dice.

In this petition, the partial list of reported cases shows that radically different opinions--each of them learned and conscientious--have issued from Connecticut, New York, Minnesota, New Mexico, Louisiana, Alabama, California, Texas, Tennessee, Arkansas, South Carolina, Delaware, Iowa, Wyoming, Idaho, West Virginia, Washington, Colorado, Ohio, Maryland, Montana, Florida, Missouri and Virginia. The courts of each state have labored judiciously to come to the right decision about a uniform code and a federal law, both meant to protect interestate families and to promote federal judicial peace. It seems time for the United States Supreme Court to speak.

II. THE VIRGINIA COURT HAS ABUSED ITS CONTEMPT POWER IN ORDER TO DEPRIVE THE MOTHER OF CONSTITUTIONAL RIGHTS.

A. The Mother was Denied Procedural Due Process

Judge Bach issued a rule for civil

contempt on September 21, 1982, ordering Mother to show cause on October 1, 1982; it was never served upon her, yet she was held in contempt on October 26, 1982. [Appendix 30-31] In May, 1985, two and one-half years later, in an obvious contrivance, the Judge issued a bench warrant for her arrest for criminal contempt, alleging the contemptuous act of "misleading him" in 1982. [Appendix 32-33] The Sheriff arrested Michelle on that warrant on February 18, 1987. On February 20, 1987, upon being informed that the warrant had been drawn after the statute of limitations ran, Judge Bach offered to draw new process, using new grounds to satisfy legal requirements for Michelle's arrest [Appendix 34]. He revoked her bond and jailed her. [Appendix 34] Three weeks later he tried her for criminal contempt without a jury and sentenced her to 12 months in jail.

None of the protections afforded to citizens before they may be deprived of their liberty were afforded to Michelle.

B. The Virginia Court Did--or Did Not?-- Have Jurisdiction Over Civil Contempt

When matters of contempt and custody are inextricably interwoven, jurisdiction to hold a person in contempt depends on subject matter jurisdiction pursuant to the UCCJA. Funk v. Macauley, Ind. App. 2 Dist. 1983, 457 N.E.2d 223. O'Daniel v. Walker, 1985, 686 S.W.2d 805, 14 Ark. App. 210. The states' conclusions on this matter are divided just as sharply, if not as often, as their conclusions about custody jurisdiction. The Macauley court, for example, held that 10 years after the children had left the state with their custodial parent, that state retained jurisdiction. Kirylik v. Kirylik, 357 S.E.2d 449 (S.C. 1987) separated jurisdiction to hear a custody modi-

fication petition from jurisdiction to hold a parent in civil contempt, saying:

> "Even if a court loses jurisdiction to modify its prior orders under the UCCJA, it retains the inherent power to enforce compliance ... through civil contempt." Id. at 450.

It went on to affirm the trial court's decision not to exercise jurisdiction, pointing out that the Forum State could enforce the Decree, by contempt or otherwise.

Another case, Siegel v. Siegel, 417 N.E.2d 1312, 84 Ill.2d 212, 49 Ill. Dec. 198 (1981) invalidated a decree holding an out-of-state custodial parent in contempt because the statutory prerequisites for subject matter jurisdiction over the subject matter of custody could not be met, although Illinois had made the initial decree and had even provided in it that it had exclusive continuing jurisdiction. The decree enjoined both parents from seeking modification in

other forums. Id. at 1313. The Court's held that it was the general rule in Illinois that the Decree State maintained continuing jurisdiction of the subject matter and the parties for modification purposes, but went on to analyze the UCCJA provisions for modification jurisdiction, concluding that the Act

> "does not excuse the original court from continuing to meet the jurisdictional standards of section 3 [analogous to VA Code 20-126]."

This case relied heavily on Professor B. Bodenheimer, reporter for the special committee of the Commissioners on Uniform State Laws which prepared the UCCJA, citing B. Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vand.L.Rev. 1207, 1237 (1969). Bodenheimer's position was that the Decree State would have jurisdiction to modify "unless that court no longer has jurisdiction under the 'home

state' or 'strong contacts' test." 22 Vand.L.Rev. 1207, 1236. The Siegel court concluded that, since the custody and contempt proceedings were inextricably interwoven,

> "...even though the mother was in violation of the circuit court's order, it was an abuse of that court's discretion to adjudge her in contempt ..."

at which point it found the court below to be without jurisdiction and vacated.

C. The Mother was Denied Substantive Due Process

Since there is a difference in standards of proof and Constitutional protection for defendants in criminal as opposed to civil proceedings, whether contempt is civil or criminal is very important. Virginia itself recognizes that contempt is considered a serious crime to be tried by a jury when the sentence exceeds six months. Green v. Tucker, 375 F.Supp. 892 (E.D. Va. 1974). The essential difference is that civil

contempt lies for disobedience to an order setting forth the rights of a litigant (such as denial of visitation), whereas criminal contempt is generally a direct act against the Court or at least an act which obstructs justice. A Judge has the power to punish summarily for direct, criminal contempt which might threaten the administration of justice. From the record in this case, it is clear that Michelle was held in criminal contempt not because the elements of criminal contempt were present, but because the court wished to jail her.

The Virginia court manipulated the contempt powers as it had manipulated the jurisdictional statutes. The judge held Mother in contempt by embedding her trial in a civil custody proceeding. Then he sentenced her for criminal contempt, and appeal was denied her because the contempt, said to be criminal, could not

be reviewed on appeal (like a civil matter) but only on writ of error.

D. The Mother was Denied Equal Protection of Law

Perhaps the abuse of the contempt powers shows, more clearly than anything else, why jurisdiction in custody matters must not be determined by "feelings" and "impressions" but only by adherence to law. If a state court does not lawfully exercise jurisdiction over the subject matter of a custody trial, it must discard someone's constitutional rights in order to enforce its own orders. That is what happened in the Etlin case.

Michelle would have had to be tried in Maryland for having denied visitation, or having "absconded with the child," if that were to be considered criminal contempt. (Article III, Section [3], U.S. Constitution). She could be tried in Virginia for civil contempt of a valid Virginia decree, but a jail term could

only be imposed in a coercive, not punitive, manner. (Since Daniel's father already had him, Michelle could not be coerced to provide him.) No matter how the contempt sentence is viewed, it comes out unConstitutional. And in many other state courts in the country, civil and criminal contempt are being mixed, redefined, confused, misused and abused in order to provide judges with legislative, judicial and executive powers--in effect, to provide judges with kingly powers.

This was briefed to the Court of Appeals of Virginia [Appendix 15], which rejected consideration of the appeal on a technicality that protected no valid state interest: that contempt had to be reviewed by writ of error. The Virginia statute cited, 19.2-318, authorizes writ of error in criminal contempt cases; it is not exclusive and does not contain any

language which precludes review by appeal. When trial of contempt and custody are held together, it would seem obvious that the appeal of both should be taken together, to promote judicial economy if not for other reasons.

It is undeniable, by the mere fact that the contempt and custody trials were held together, that they were inextricably interwoven. Michelle's conviction and sentence were contained in the same order as the custody decision. [Appendix 10-11] Systematically, then, the contempt was viewed as civil and/or criminal in Michelle's worst interest. When Michelle would have Constitutional rights, the contempt was viewed in a civil context; when Michelle would have the right of appeal, it was viewed in the criminal context. When Michelle would have escaped a jail term, it was viewed in a criminal context; when facts had to

be proven beyond a reasonable doubt and a jury had to be empaneled, it was viewed as civil.

This contamination even persisted in the Appellate Court. Michelle's petition for review to the Supreme Court of Virginia pointed out that the technicality was applied in a discriminatory manner, since at least one defendant recently had his criminal contempt conviction reviewed by appeal in the very Court where her own appeal was dishonored. [Appendix 38] However, her petition was denied.

The use of the contempt powers of a court can effectively elevate judge-made "law" over legislature-made law, threatening the separation of powers inherent in the Constitution. The trial court below made a law in 1982 imposing affirmative obligations upon Michelle, a citizen of Maryland. (This order was not even signed.) The same trial court then

interpreted and enforced its own unwritten order, and punished disobedience to it, without subject matter or personal jurisdiction, over a citizen of another state.

The powers of civil and criminal contempt are unduly vague and particularly in the Commonwealth of Virginia, they merge and are ill defined. See Leisge v. Leisge, 224 Va. 303, 296 S.E.2d 538 (1982). As a result, proceedings can end up following no law at all, as they fall through the cracks between civil and criminal procedure. This violates a defendant's right to substantive due process. (Fourteenth Amendment to the U.S. Constitution, Section 1).

Had Michelle broken a real Virginia law in Maryland, she would not have been subject to such a deprivation of rights. Had she broken a Maryland law in Maryland, or a Virginia law in Virginia, she

would be entitled trial with court appointed counsel, bail, the presumption of innocence, the right to appeal and a jury. But most important, she would have had the protection of the Eighth Amendment against being deprived of her first-born son as punishment for a misdemeanor.

CONCLUSION

The Uniform Commissioners, drafters of the PKPA, the commentators, and the highest courts of the several States have toiled for 20 years with more than 10 pages of law (small print, single spaced) describing the jurisdictional rights and responsibilities involved in interstate custody disputes. In light of these complex criteria, the idea that jurisdiction in 1981 automatically confers jurisdiction in 1987 is ludicrous. Their careful work could have been cut drastically if they had considered only jurisdiction for original decrees, and then tacked on the Jurisdiction Forever Rule.

A logical view of the Jurisdiction Forever Rule also supports the statutory view. To say that a court may rule in 1987 because it ruled in 1981 is no more logical than to say that a mother should have custody in 1987 because she had cus-

tody in 1981. In fact, the latter is much more likely to be reasonable in the child's best interest. Recognition that custody depends upon circumstances which can change requires corresponding recognition that jurisdiction to decree as to custody does the same. To imagine that a child has moved with his custodial parent to a sister state, and his life has changed to such a degree that his custodial situation should be changed, while assuming the immovable ability of the decree state to make a determination merely because it has decreed in the past, is senseless. How can the ability of the custodial parent to function in the best interests of the child be considered continuously changeable, while the ability of the Decree State court to function in the best interests of the child remains a constant?

A more important consideration is

that the equal protection of laws guarantees for residents of a sister state access to its courts of competent jurisdiction. Absent some overriding reason why the court in the sister state (if it has become the home state of the child and the state with the most significant evidence) should not provide access to its citizens, that court cannot be deprived of jurisdiction. For Virginia to be able to deny Michelle and Daniel the equal protection of Oregon's laws is ipso facto unConstitutional. It is also absurd. In fact, Mr. Justice Marshall, writing for the Court in Thomson, supra, commented on a similar eventuality that would arise if federal courts were to hear interstate cases under the PKPA:

> "Petitioner's proposal is all the more remarkable in the present case, in which he seeks to have a California District Court enjoin enforcement of a Louisiana state-court judgment before the intermediate and supreme courts of Louisiana even have had an opportunity to review

that judgment." Id. at 520, n. 5. While Oregon proceeded in compliance with both the UCCJA and the PKPA, Virginia suddenly usurped its jurisdiction (as soon as Father physically removed Daniel from Oregon) at a time when it could not comply with either the Uniform Act or the Federal Act to decree concerning custody of Daniel. The Virginia court had no right to rule in 1987 because it had no statutory basis to do so.

The court also exceeded its jurisdiction in convicting Mother of criminal contempt. Such conviction would require a lawful proceeding which automatically activated constitutional protection for the mother. The order of which Mother was charged with contempt would have had to be registered in Maryland (which could not be done because it was not signed and it did not comply with the PKPA), and Maryland would have the responsibility

under the PKPA to enforce it. Michelle's contempt trial would have taken place in Maryland with a jury, if she chose.

No person may be deprived of life, liberty or property without due process, even by a judge. The powers of a judge, like other legal powers vesting in the state, may not encroach upon individual liberty absent the operation of law.1/ Yet the case before the Court reveals that a judge in Virginia not only encroached upon the Mother's liberty interest in the equal protection of laws, including the Uniform Law and the Federal Act passed to shore it up; he also removed the mother's Constitutional rights in trying her for a crime by abuse of the civil contempt process of the court.

1/ There is a difference between "operation of law" and "done by a Judge." The difference is statutory basis for what the Judge does. Lacking statutory authority, a Judge's deeds are not valid.

This Court should grant certiorari because the Supreme Court of Virginia has upheld a state court abuse of process which has denied the Mother her Constitutional rights, while ignoring a federal act and a uniform law instituted to prevent such abuses.

Respectfully submitted,

Michelle Etlin

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Dated:
March 14, 1989

88-1504

Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

Michelle M. Etlin, Petitioner,

v.

Vladimir N. Etlin, Respondent.

A P P E N D I X

IN SUPPORT OF

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

Michelle M. Etlin, pro se
3009 Military Rd. NW
Washington, D.C. 20015

March 14, 1989

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICHELLE M. ETLIN,	:	
	:	IN CHANCERY
Complainant,	:	No. 68775
	:	
vs.	:	
	:	
VLADIMIR N.ETLIN,	:	
	:	
Defendant.	:	

O R D E R

THIS CAUSE came on to be heard Thursday, March 12, Monday, March 16, and Tuesday, March 17, 1987, upon the pleadings formerly filed herein, each party appearing in person and by counsel, and the Court heard the testimony of the parties and the witnesses in support and in opposition to each item before the Court, and received into evidence various documents, and

UPON CONSIDERATION of all of the evidence and the arguments of counsel had in open Court,

IT APPEARING TO THE COURT that the

Complainant, Michelle M. Etlin (the mother) has, from time to time, in prior hearings before this Court and in the Court in Oregon, had presented a demeanor of a nice, sweet person and a good mother with the best interest of her child being foremost in her mind, and had convinced the Court in prior hearings that Vladimir N. Etlin (the father), was an inflexible, unyielding, unfit father, and that the best interest of the child would be solely served by being with her, and

IT APPEARING TO THE COURT that the mother has been less than truthful with the Court, has been less than truthful in her dealings with others, and has conducted her affairs, particularly with respect to the child, in a manner that was deceitful and harmful to the child, causing the child to live a life of fraud as the child was carried with her all over

the world for the purpose of hiding from the father, and did so by carrying the child along with her to South Africa, Belgium, Canada and, ultimately, reposing in Oregon in a life in which he was obliged to live under a false name and under the threat that if he were to reveal his whereabouts to anyone and, in particular, his father, he would suffer a terrible punishment as a child, to-wit: he would lose the companionship of his mother, and

IT APPEARING TO THE COURT that the actions and conduct of the mother were designed solely for the purpose of denying to the father any means to see or visit his son, to share in any part of the son's life, and to deprive the child during the most important years of his life, four to nine, of any contact with his father, and

IT APPEARING TO THE COURT that the conduct by the mother amounted to cruelty and child abuse in which the mother put her own selfish interests ahead of the welfare of the child and to the detriment of the child, and

IT APPEARING TO THE COURT that as of today, this Court rejects the conclusions formerly made by Dr. Ganz to the effect it would be harmful for Danny to be around his father.

IT APPEARING TO THE COURT that the events that have taken place since the prior hearing have demonstrated that the best interests of the child are not served by being in the care and custody of the mother who has such little respect for the welfare of her child, the needs of the child, for the father, and for the lawful processes of the Court that she falsified records and fled into hiding with the child, and

IT APPEARING TO THE COURT that it has been disastrous for the child to live the life of fraud all over the world and to have been deprived of the natural contact with the father and to have been cruelly threatened with the loss of his mother forever if he in any way followed the natural instincts of a child to see his father, and

IT APPEARING TO THE COURT that the mother, in pursuit of her own selfish interests, and without regard to the welfare of the child, made the child aware selectively of portions of Court proceedings, the purpose of which was to enhance her role with the child, destroy the father's role with the child, and place a shield or barrier in the child's mind between the child and his father. It is the Court's opinion that the mother's conduct of telling her son about the cases and allowing him to read the

transcripts was near tantamount to child abuse, and

IT APPEARING TO THE COURT that the father intends to remain in residence in Falls Church, Virginia, and that the mother, when released from incarceration, will return to her home in the State of Oregon, and

IT APPEARING TO THE COURT that the father is a fit and proper person to have sole care and custody of said minor child and that under all the facts and circumstances now before the Court the best interests and welfare of the child will be served by awarding sole custody to the father for all of the reasons set forth (in brief) in this Order, as well as in the Court's oral findings on March 17, 1987, it is,

ORDERED, ADJUDGED AND DECREED that this court has jurisdiction to hear this cause which jurisdiction shall be con-

tinuing, and the Motion to transfer this case to Oregon is denied; and it is

ORDERED, ADJUDGED AND DECREED that the Motion of the mother, Michelle M. Etlin, for a change of custody for the child, Daniel A. Etlin, be and the same hereby is denied, and that the sole care and custody of said minor child shall be with and it hereby remains with the father, Vladimir N. Etlin, granting to the mother, Michelle M. Etlin, a right of visitation to be defined as one (1) month with the mother in Oregon during the summer of 1987, said month to be agreed between the parties or, if not agreed, then shall be the month of July and those weeks during the child's Christmas holiday from school. This visitation shall begin one (1) day after the beginning of the Christmas holiday; that is, the first day of the holiday shall be with the father, and the second day of the holiday

the child shall travel to the home of the mother in Oregon where he shall remain until two (2) days before school is to begin; that is, he shall return on a day to allow one (1) full day at home with the father before the start of school. It shall be the responsibility of the mother to pay for the airplane fares and arrange for the tickets and other transportation to and from Virginia to Oregon in order to comply with this Order of the Court, it being further understood that the Court will leave open the consideration of whether to expand same depending upon the circumstances then existing; and

IT IS FURTHER ORDERED that Mrs. Etlin shall be entitled to make a telephone call at her expense one (1) night a week from Oregon to talk to her son. The time and evening shall be agreed between the parties, but in the event that they

do not agree, then it shall be at 7:00 o'clock P.M. eastern time every Wednesday, the father being specifically directed to see to it that the son is present and available to receive the telephone call at that time or at such time as the parties have mutually agreed.

The summer and Christmas holiday visitation Order of the Court is based upon the presumption that the mother will continue her residence in Oregon and the father will continue his residence in Falls Church, Virginia; and

IT IS FURTHER ORDERED that the mother shall not, on any occasion, take the child except at the times specified in this Court Order or any Amended Court Order, and shall not take the child outside of the continental United States, and that the mother shall advise Ann Cook and Loretta Dunn, of the Department of Social Services, and the father of any

and all travel plans and such places outside of her home in Oregon, giving addresses and phone numbers if she travels with her son from her home in Oregon; and

IT IS FURTHER ORDERED that neither parent shall make any remark that is derogatory of the other to the child or in the presence of the child, nor shall either party discuss this case or display any copies of transcripts or pleadings to the child; and

IT IS FURTHER ADJUDGED that Michelle M. Etlin is guilty of a willful contempt of this Court because of her failure to obey the judgment of this Court in that she permanently removed the child, falsified records and fled with the intent of depriving the father of his right of reasonable visitation and the child of a natural association with his father; and

IT IS ORDERED that Michelle M. Etlin be committed to the Sheriff of Fairfax County, Virginia, to the County jail to be there detained in custody for a term of twelve (12) months, of which sentence ten (10) months are suspended, conditioned upon her strict compliance with each and every order of this Court concerning custody, visitation and her conduct towards the child, and she is further placed on three (3) year's inactive probation, and the suspension will continue for that period of three(3) years, conditioned upon her strict compliance with each and every Order of this Court concerning custody, visitation and her conduct toward the child, and

IT IS FURTHER THE ORDER OF THE COURT that the mother is to have a visitation with her son before her return to Oregon, provided, however, said visitation shall be conducted solely in the presence

of Loretta Dunn or such other social workers as may be available, and the Department of Social Services shall remain involved in this case, advising the Court from time to time of any deviation of the parties from this Order; and

IT IS FURTHER ORDERED that Michelle M. Etlin shall forthwith surrender her passport to the Court where it shall be sealed and removed only by leave of Court and any passport that she has for her son, Danny, shall be forthwith surrendered to Mr. Etlin and that she shall not apply for any new passport without further order of this Court; and

IT IS FURTHER ORDERED that upon Michelle Etlin giving the Clerk of this Court her name and address where she can be served with process within Virginia and without Virginia, then Robert Surovell is withdrawn from this case as

counsel. Service upon Michelle Etlin out of the state of Virginia by certified mail is hereby authorized; and

IT IS FURTHER ORDERED that Michelle Etlin shall pay child support to Vladimir Etlin in the sum of $250.00 per month, the first payment to be made on or before May 1, 1987, which payment shall be for the month of April, 1987, with each monthly payment thereafter being due on the first day of each succeeding month; and

IT IS FURTHER ORDERED that Vladimir Etlin be, and he hereby is, awarded $8,800 as and for reimbursement for attorney's fees incurred in these Virginia proceedings; and

IT IS FURTHER ORDERED that a suspending bond is hereby authorized at $10,000.00 with competent surety; and

THE CAUSE IS CONTINUED.

ENTERED: March 25, 1987

s/F. Bruce Bach
THE HONORABLE F.
BRUCE BACH
FAIRFAX COUNTY CIR-
COURT COURT JUDGE

WE ASK FOR THIS:

FRIEDLANDER & FRIEDLANDER, P.C.

By: s/Jerome Friedlander
Jerome F. Friedlander, II and
James J. Harney, Counsel for
Vladimir N. Etlin
2018 Clarendon Boulevard
Arlington, Virginia 22201
703-525-6750

==========

VIRGINIA:
In the Court of Appeals of Virginia
on Wednesday, the 6th day of April, 1988.

Michelle M. Etlin, Appellant,
against Record No. 0465-87-4
Circuit Court No. 68775
Vladimir N. Etlin, Appellee.

Upn an appeal of right from a judgment rendered by the Circuit Court of Fairfax County on the 25th day of March, 1987.

Before Judges Hodges, Keenan and Moon

Michelle M. Etlin (mother) appeals from a decision in which the trial court found her in contempt of court and granted Vladimir N. Etlin (father) custody of their minor child Daniel. The

issues presented in this appeal are: (1) whether the trial court erred in finding the mother in contempt of court; (2) whether the trial court had jurisdiction to determine Daniel's custody; and (3) whether there was evidence to support the trial court's ruling that an award of custody to the father was in the best interests of the child.

Initially, we find that the mother's contempt conviction is not properly before this Court in this Appeal. Code §19.2-318 provides that an appeal from a judgment of criminal contempt must be sought here by a petition for a writ of error. Since a writ of error was not sought from the mother's contempt conviction, we do not consider the merits of the issue.

Second, we find that in accordance with Code § 20-126(A)(2), the evidence of record was sufficient to support the

trial court's finding that it had jurisdiction to determine Daniel's custody.

Third, in examining the trial court's custody determination, we apply the following standard of review: "The trial court's decision, when based upon an ore tenus hearing, is entitled to great weight and will not be disturbed unless plainly wrong or without evidence to support it." Simmons v. Simmons, 1 Va. App. 358, 361, 339 S.E.2d 198, 199 (1985). In the case before us, the evidence showed that the mother had completely deprived the child of contact with his father for over four years. During this time, the mother had the child assume and live under a false name. Further, the trial court heard evidence that the mother told the child that if he telephoned his father, he would probably never be able to see her again. After hearing this and all of the other evi-

dence, the trial court concluded that the best interests of the child required an award of custody to the father. Upon review of the evidence placed before the trial court, we find that its custody determination was not plainly wrong or without evidence to support it. Id. at 361, 339 S.E.2d at 199. Accordingly, the decision of the trial court is affirmed. The appellant shall pay to the appellee damages according to law.

This order shall be certified to the trial court.

A Copy,

Teste:

David B. Beach, Clerk

By: s/signature

Deputy Clerk

==========

VIRGINIA:
In the Court of Appeals of Virginia
on Friday, the 24th day of June, 1988.

Michelle M. Etlin, Appellant,
against Record No. 0465-87-4
Circuit Court No. 68775
Vladimir N. Etlin, Appellee.

Upon a petition for rehearing.

Before Judges Hodges, Keenan and Moon

On consideration of the Petition of the Appellant to set aside the judgment rendered herein on the 6th day of April, 1988, and grant a rehearing thereof, the said Petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By: s/Deborah A.R. Clem

Deputy Clerk

==========

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 14th day of December, 1988.

Michelle M. Etlin, Appellant,

against Record No. 880845
Court of Appeals No. 0465-87-4

Vladimir N. Etlin,

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

by: s/signature

Deputy Clerk

==========

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICHELLE M. ETLIN Complainant and Cross-Defendant	:	
v.	:	In Chancery 68775
VLADIMIR N. ETLIN Defendant and Cross-Complainant	:	

ORDER

THIS CAUSE came on to be heard, commencing on the fifteenth day of January, 1981, upon the motion of complainant, Michelle M. Etlin, for permanent custody of the minor child of the parties, Daniel Etlin, and upon the cross-motion of defendant, Vladimir N. Etlin, for permanent custody of the minor child of the parties, and, in the alternative, for visitation with said minor child; and upon the further motions of complainant for an award of child support, pendente lite spousal support and counsel fees; and upon consideration of the testimony of the parties, the testimony of the

witnesses who appeared before the Court on the fifteenth day of January and the twentieth day of January, 1981, upon the exhibits introduced and admitted into evidence by the respective parties and upon consideration of argument by counsel for the respective parties, it is hereby

ADJUDGED, ORDERED AND DECREED that permanent care, custody and control of the minor child, Daniel Etlin, be and the same is hereby awarded to complainant, Michelle M. Etlin; and it is further

ADJUDGED, ORDERED AND DECREED that the defendant, Vladimir N. Etlin, be and he is hereby awarded visitation privileges with said minor child every other Saturday, beginning at 5:00 o'clock p.m. until Sunday at 5:00 p.m. and, in addition, a visitation privilege with said minor child for one week during the month of July in each year; and the defendant is to have such other reason-

able visitation times with the minor child as the complainant shall deem to be appropriate; and it is further

ADJUDGED, ORDERED AND DECREED that during such visitation periods between the minor child and the defendant, in the event the minor child needs medical attention on an emergency basis, the defendant is responsible for seeking out that emergency care, but the defendant shall also immediately notify the complainant so that the complianant may be available, as quickly as possible, to assist in having assistance rendered to the child, and the defendant is otherwise prohibited from seeking medical attention or treatment for the minor child; and it is further

ADJUDGED, ORDERED AND DECREED that the defendant be and he is hereby ordered and directed to pay the sum of $400.00 per month to the complainant for the sup-

port and maintenance of the minor child, said monthly child support payments to be paid without demand and without deduction on the first day of the month, commencing with the month of February, 1981; and it is further

ADJUDGED, ORDERED AND DECREED that the defendant be and he is hereby ordered to maintain the child and the complainant on his present hospitalization and major medical insurance policy; the complainant shall be maintained by the defendant on such policy until such time as a final decree of divorce is entered between the parties in this cause, and the child is to be maintained by the defendant on said insurance until further Order of the Court; and it is further

ADJUDGED, ORDERED AND DECREED that the Court makes no award to the complainant of spousal support at this time; this decision is made without prejudice, however, for the complainant to raise this issue and have it heard on its merits when the divorce case is heard on its merits to determine if the complainant is entitled to spousal support at that time; and it is further

ADJUDGED, ORDERED AND DECREED that the defendant be and he is hereby ordered to pay to the complainant the sum of $500.00 pendent lite counsel fees and the following costs: $32.25 for filing and service fees; and $456.20 for the transcript reporter, all of the foregoing amounts to be paid by defendant to complainant on or before March 6, 1981.

AND THIS CAUSE IS CONTINUED.

ENTERED this 26th day of February, 1981.

s/Lewis Hall Griffith
THE HONORABLE LEWIS H. GRIFFITH, JUDGE, Circuit Court of Fairfax County, Virginia

By:

s/Sanford K. Ain
SANFORD K. AIN
4085 Chain Bridge Road, Suite 203
Fairfax, Virginia 22030
331-7120
Counsel for Complainant

A Copy Teste:
Warren E. Barry
Clerk

By: Genevieve Apostolakis
Deputy Clerk

Seen and exception noted:

s/Stefan C. Long
STEFAN C. LONG
121 South Royal Street
Alexandria, Virginia 22313
549-8821

Counsel for Defendant

s/Vladimir Etlin
Vladimir N. Etlin

==========

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

	F I L E D	
MICHELLE M. ETLIN	:	Apr.17 1981
Complainant	:	James E.Hoofnagle
Cross-Defendant	:	Clerk of the Circuit Court of
v.	:	Fairfax County, VA
VLADIMIR N.ETLIN	:	
Defendant and Cross-Complainant	:	In Chancery No. 68775

MOTION TO DISQUALIFY

COME NOW Defendant/Cross-Complainant, Vladimir N. Etlin, pro se, and move this Court to disqualify Lewis H. Griffith, Judge of this Court, from presiding at the trial over the case NO. 68775 pursuant to Code of Virginia 17-7(1)(2), 19.2-153 and in support whereof say as follows:

1.)Judge L.H.Griffith is so situated in respect to this case as to render it improper because:

a)Defendant/Cross-Complainant, Vladimir N.Etlin, has filed his Complaint against Judge Griffith in the United

States District Court.

Submitted respectfully
s/Vladimir N. Etlin
Vladimir N. Etlin
pro se
7403 Lisle Ave.
Falls Church, VA 22043
Tel: 356-3106

==========

V I R G I N I A :
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICHELLE M. ETLIN	)	F I L E D
Complainant and	)	Feb.5 1982
Cross-Defendant	)	James E. Hoofnagle
v.	)	Clerk of the Cir-
	)	cuit Court of
VLADIMIR N.ETLIN	)	Fairfax County
Defendant and	)	
Cross-Complainant	)	

MOTION TO SET ASIDE COURT ORDER

COME NOW the defendant and cross-complainant, Vladimir Etlin, pro se and move this Court to set aside the Order of February 26, 1981 for fraud upon this Court, pursuant 8.01-428, 430 and 680, of the Virginia Code and Rule 60 of the Federal Rules of Civil Procedures, and asks to award joint or sole custody of

his son, Daniel Etlin, and in support says the following:

1). Complainant, Michelle Etlin, her lawyer, S.Ain, and expert witness, Dr. J.Ganz, had defrauded this Court at the hearing of January 15 and 20, 1981.

2). Because of the complainant's fraud at the hearing of January 15 and 20, 1981, the defendant's rights for equal protection and due process of the hearing were violated.

3). Because of fraud this Court's judgment of February 26, 1981 was plainly wrong.

4). It is in the best interest of the parties' son Daniel Etlin, to have frequent and continuing contact with both parents and to be in the custody of both parents or in the custody of his father, Vladimir Etlin, who can ensure

his son's frequent contact with his mother.

Respectfully submitted

s/Vladimir Etlin
Vladimir N.Etlin, pro se
7403 Lisle Ave.
Falls Church, VA. 22043
Tel.: 3563106

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion to set aside order has been hand delivered to the complainant's counsel, S.Ain, at 4085 Chain Bridge Rd. Suite 203, Fairfax, VA. 22030 on this 5th day of February, 1982.

s/V.Etlin

==========

Transcript of Proceedings June 2, 1982, Oral Ruling of Judge F. Bruce Bach

P R O C E E D I N G S

***

THE COURT: Get your pencil out, Mr. Etlin, so you can write down--so you'll know what I'm going to say.

Number one, I find no credible evidence of fraud or failure to produce documents; that's a finding of fact.

Insofar as the decision on the rest of the things, I fully note that Mrs. Etlin is not going to be happy and Mr. Etlin is not going to be happy.

Dr. Ganz has mentioned appeasement, and I thought of Neville Chamberlain and I readily acknowledge I may be making a heck of a mistake, Mr. Etlin, in trying to appease you or trying to give you the benefit of a doubt on a lot of these matters because you are the father.

==========

V I R G I N I A :
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MICHELLE M. ETLIN)
versus) Chancery No.68775
VLADIMIR N.ETLIN)

ORDER

THIS CAUSE CAME to be heard on October 1st and 15th, 1982, upon Defendant's motion to Change Custody, and upon a Rule to Show Cause Order returnable on October 1, 1982, which was duly served upon the Complainant's counsel of record,

Charles Geschickter, Jr., and upon the Complainant by posting; and

IT APPEARING TO THE COURT that ... the Commonwealth of Virginia is the home State [sic] of the parties' son, Daniel Etlin, ...

UPON CONSIDERATION WHEREOF, ... the Complainant has failed to comply with the orders fo this Court and is in direct and willful contempt of this Court's orders of June 2, September 2nd and September 21, 1982 by consistently denying Defendant's visitation with his son, by denying Defendant telephone contacts with his son, by denying Defendant's participation in his son's activities and by failing to appear at this Court's hearing on October 1, 1982; * * *

ORDERED that permanent care, custody and control of the minor child, Daniel Etlin, be and the same is hereby awarded to the Defendant, Vladimir Etlin; * * *

Entered this 26th day of October, 1982.

s/F. Bruce Bach

JUDGE F. BRUCE BACH

==========

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

BENCH WARRANT
(CAPIAS)

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

CHANCERY NO. 68775

IN RE:
MICHELLE MOSS ETLIN
White Female
approximately 38 years old
5'4"
Brown hair Brown eyes
SSN: 152-34-9549

Last Known Address:
Okaloosa County, Florida
Near Fort Walton Beach

To Any sheriff or Police officer,
Greetings:
* * *
WHEREAS, it appears from court records and the affidavit of VLADIMIR N. ETLIN that MICHELLE MOSS ETLIN intentionally misstated facts to this court and misled this court when she appeared before it on September 3, 1982 and that a rule to show cause why she should not be tried for criminal contempt has been brought

against MICHELLE MOSS ETLIN. * * *

THEREFORE, ... I command you to apprehend the said MICHELLE MOSS ETLIN, and bring her before the Judge of our Circuit Court of Fairfax County, Virginia, FORTHWITH, to show cause, if any she can, ... why she should not be held in criminal contempt of this Court for intentionally having misstated facts to this Court and misled this Court.

AND HAVE THEN AND THERE THIS WRIT AND MAKE RETURN HOW YOU HAVE EXECUTED THE SAME.

GIVEN under my hand and the seal of this Court this 3rd day of May, 1985 and in the 209th year of the Commonwealth.

s/F.Bruce Bach
F.BRUCE BACH, Judge

(EXECUTE AND RETURN THE ORIGINAL)
Executed this __ day of _____, 19__
FBB BOND SET AT: $10,000.00 cash
or corporate surety
DATE OF HEARING: returnable to the 1st Friday at 10:00 o'clock a.m. after MICHELLE MOSS ETLIN is apprehended.

==========

Excerpt of transcript of proceedings on February 20, 1987, page 10:

COURT: "... I think it's very important that [Mr. Etlin] understands that she's paid her debt to society, and that you don't violate court orders willy-nilly, and that when you do, there's serious consequences to pay, and tht he can look at it in some way other than, 'she got away with something that injured this child and certainly injured him,' although my concern is for the child.

So frankly, I'm going to revoke the bond, and I do revoke the bond right now and if I need to put other grounds in the warrant, I'm going to do it.

And I don't know how long I'm going to keep her in jail. I'll listen to your argument."

==========

Quotation from Mother's Petition for

Rehearing to the Court of Appeals:

Rule 5A:1(a)(1) defines "appeal" to include "writ of error." It is not appropriate, especially in a case of such importance, to elevate form over substance, and Virginia authority so holds.

> "Although the statute provides that a 'writ of error' shall lie in contempt cases, **where the Court has before it every requisite necessary for the granting of a writ of error, the Court will treat the indorsement of the fact that an 'appeal' and not a 'writ of error' was granted as mere inadvertence**. [emphasis supplied] citing Michie's Jurisprudence, §35, Vol.4A at 583-4, citing Roanoke Water Works Co. v. Roanoke Glass Co., 144 S.E. 460 (1928).

Petition for Rehearing to Court of Appeals, April 17, 1988, page 2.

==========

V I R G I N I A :
IN THE CIRCUIT COURT OF FAIRFAX CO.

MICHELLE M. ETLIN	:	
Complainant,	:	IN CHANCERY
v.	:	68775
VLADIMIR N. ETLIN	:	
Defendant.	:	

MEMORANDUM OF POINTS AND AUTHORITIES

FIRST QUESTION PRESENTED

DOES A CIRCUIT COURT IN VIRGINIA HAVE SUBJECT MATTER JURISDICTION TO CHANGE CUSTODY OF A CHILD PURSUANT TO §20-108 OF THE CODE OF VIRGINIA WHEN THE CHILD HAS BEEN A NON-RESIDENT OF VIRGINIA FOR SIX-AND-A-HALF YEARS PRECEDING THE DATE OF THE HEARING?

* * *

What makes this case unusual is that the migrating parent was the party who prevailed, and that the losing parent who persisted time and time again in challenging custody did so intrastate, not interstate. ... Her purpose in departing was not to seek a more favorable forum, but rather to remove herself and the child from the very real abuses of litigation which the statute seeks to eliminate on an interstate basis. * * *

the mandatory obligations of §20-132 and §20-128 were violated [by the Virginia court] as well affecting the validity of the June, 1982 Order and the October 26, 1982 Order.

Quoted from Memorandum of Points and Authorities filed March 11, 1987 with pretrial motions, pp. 1,3,5.

==========

Quotation from Mother's Petition for Review to the Supreme Court of Virginia, dated July 22, 1988:

Jurisdiction is a threshold determination of such importance to any custody decision that a fair trial cannot be held in one state if another state has a closer connection with the child. ... the child is entitled to have matters concerning his custody decided in the forum which has the maximum access to relevant information concerning his welfare, regardless ot the convenience of his parents.

Petition for Review to Virginia Supreme Court, July 22, 1988, at p. 25.

==========

Excerpt from Mother's Petition for Review by Supreme Court of Virginia:

"Even the Court of Appeals, although it is a relatively new court, has heard and reversed criminal contempt convictions brought by way of appeal. See, e.g., Carter v. Commonwealth, Record No. 0102-85, Court of Appeals of Virginia, June 17, 1986, 345 SE 2d 5 (1986). In that case, a criminal defendant ... was held in criminal contempt and sentenced to ten days. He brought an appeal, not a writ of error, and the Court of Appeals reviewed and reversed the trial court per Justices Baker, Barrow and Hodges (including one of the same judges empaneled in the instant appeal)."

Petition for Review to Supreme Court of Virginia, July 22, 1988, pp. 8-9.

==========

Excerpt from Mother's Petition for Rehearing to the Virginia Court of Appeals:

Section 20-126(A)(2), the Virginia

counterpart of the UCCJA, vests jurisdiction in the Court when:

> "It is in the best interest of the child that a Court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships;"

Jurisdiction is a threshold determination of such importance to any custody decision that a trial cannot be appropriately held in one state if another state has a closer connection with the child. ... According to the Commissioner's [sic] commentary on the UCCJA, Section 20-126(A)(2), more than any other section, must yield to conservative interpretation so as not to operate contrary to the purposes of the UCCJA. The cases encourage judicial restraint, not jurisdictional aggression (whether punitive or based on judicial

hubris), to ensure that custody decisions are made in the state with maximum access to relevant information, and to prevent instability in custodial arrangements.

* * *

There was not significant evidence in Virginia concerning Daniel in 1987; in fact, the record on appeal provides absolutely no showing of sufficiency of evidence available in Virginia upon which to base an appropriate custody evaluation. The Department of Social Services was directed, on February 20, 1987, to investigate Daniel's life in the four years that he was away, but that investigation was halted by Judge Bach himself, who candidly admitted that he didn't want the information developed by the department. He also announced, at the opening of the trial, that he was not considering the "usual" things considered in a custody trial. In fact, he

considered only one fact: the fact that

Mrs. Etlin had disobeyed <u>his</u> order.

Mother's Petition for Rehearing, April 17, 1988, pp. 11-13.

==========

Excerpts from transcript of February 20, 1987:

SUROVELL: Your Honor, ... based on the statute of limitations, 29.1-8, ... the show cause order was issued March -- I'm sorry, May of 1985, alleging within the body of the warrant, and also, in the affiavit in support of the warrant, acts that occurred in 1982, and no subsequent acts.

* * *

And I'd call your attention to the fact, and I'm prepared to prove this morning, and I don't think it's controverted, that the defendant here was, since 1980, a resident in the State of Maryland, and thereafter, the resident of other states, and that the concept of flight from arrest, contemplates a necessity for residency here in Viginia because the misdemeanor powers of the Court do not extend beyond the borders.

COURT: Let me simply say that her offense, or her contempt, while it may not state it in that bench warrant in May, was a continuing thing, and it continued right up until a couple of days ago. So I'll issue a new bench warrant.

Transcript, February 20, 1987, pp. 6-7.

Supreme Court, U.S.
FILED
MAY 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHELLE M. ETLIN,
Petitioner,

v.

VLADIMIR N. ETLIN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

BRIEF IN OPPOSITION

JAMES J. HARNEY *
FRIEDLANDER & FRIEDLANDER, P.C.
2018 Clarendon Boulevard
Arlington, Virginia 22201
(703) 525-6750
Attorney for Respondent

* Counsel of Record

May 5, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. (a) Was there sufficient evidence to support the trial court's finding that it had jurisdiction to determine Daniel's custody, where the ex-wife, Michelle M. Etlin, willfully absconded with the four year old child of the parties in October 1982 and remained secreted until being discovered in August of 1986.

(b) Is there a federal question as to the applicability of the Parental Kidnapping Prevention Act (PKPA) where the state laws of Virginia controlled continuing jurisdiction of Virginia's Circuit Court and custody questions and when the evidence was sufficient to support jurisdiction?

2. Can the Petitioner be heard here in reference to her contempt conviction when she has failed to perfect her appellate rights?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1504

MICHELLE M. ETLIN,

Petitioner,

v.

VLADIMIR N. ETLIN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

BRIEF IN OPPOSITION

STATUTORY PROVISIONS

In addition to The Parental Kidnapping Prevention Act of 28 USC §§ 1738A, set forth in the petition, this case also involves:

Virginia Code Section 20-108:

> § 29-108. Revision and alteration of such decrees. —The court may, from time to time after decreeing as provided in § 20-107.2, on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pend-

ing petition for modification, but only from the date that notice of such petition has been given to the responding party.

Virginia Code Section 20-126(A)(2) in pertinent part:

§ 20-126(A)(2). Grounds for jurisdiction.—It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present and future care, protection, training, and personal relationships.

Virginia Code Section 19.2-318:

§ 19.2-318. Appeal on writ of error to judgment for contempt.—From a judgment for any civil contempt of court an appeal may be taken to the Court of Appeals. A writ of error shall lie from the Court of Appeals to a judgment for criminal contempt of court. This section shall also be construed to authorize an appeal from or writ of error to a judgment of a circuit court rendered on appeal from a judgment of a district court for civil or criminal contempt.

Virginia Code Section 19.2-320:

§ 19.2-320. Petitioner for writ of error to comply with Rules of Court.—Any party for whom a writ of error lies may apply therefor by complying with the provisions of the Rules of the Supreme Court of Virginia relative to the appeal of criminal cases to the Court of Appeals, or where an appeal is taken to the Supreme Court, with the Rules of the Supreme Court relative to appeal of criminal cases to the Supreme Court.

Virginia Code Section 19.2-321:

§ 19.2-321. With whom petition for writ of error filed.—A. The petition to the Court of Appeals shall be filed with the clerk of the Court in the manner and within the time provided by law.

B. The petition in a case wherein a writ of error lies from the Supreme Court shall be filed with the clerk of that Court in the manner and within the time provided by law.

Oregon Revised Statutes (ORS) Section 109.780:

§ 109.780. Effect of wrongful conduct of petitioner. (1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorney fees at trial and on appeal, incurred by other parties or their witnesses.

Oregon Revised Statutes (ORS) Section 109.830:

§ 109.830. Enforcement of decree of another state. The court of this state shall recognize and enforce an initial or modification decree by a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with ORS 109.700 to 109.930 or which was made under factual circumstances meeting the jurisdictional standards of ORS 109.700 to 109.930, so long as this

decree has not been modified in accordance with jurisdictional standards substantially similar to those of ORS 109.700 to 109.930.

STATEMENT OF THE CASE

This is a civil case in which the Circuit Court of Fairfax County, Virginia, held hearings on the custody of Daniel Etlin and on the contempt of the mother, Michelle Etlin, for abducting in 1982 the four year old child of the parties, and remaining in hiding until found by the father four years later. After three days of hearings, the Court entered an order dated March 25, 1987 awarding custody to the father. The Court of Appeals of Virginia affirmed on April 24, 1980 and denied application for rehearing on June 24, 1988. The Supreme Court of Virginia denied the petition for review on December 14, 1988. (Petitioner's Petition, p. 3). The Petitioner (mother) now files the Petition for Writ of Certiorari to this Court.

SUMMARY OF ARGUMENT

1. Virginia has jurisdiction to determine custody of this minor child. In accordance with Code Section 20-126(A)(2), the evidence found in the record, contained in the three days of hearings in Fairfax County Circuit Court, culminating in an order dated March 25, 1977, was sufficient to support the trial court's finding that the Virginia courts had jurisdiction to hear this matter and so found by the Court of Appeals of Virginia. Additionally, the Court has continuing jurisdiction over its initial decrees under the Virginia Code § 20-108.

2. Under Virginia Code § 19.2-318, 320 and 321 a criminal contempt conviction must be brought before the Court of Appeals by a Petition for Writ of Error. The Petitioner never sought a Petition for Writ of Error. The Code Sections 19.2-318, 320 and 321 are substantive and not just procedural.

ARGUMENT

1. The Circuit Court of Fairfax County had jurisdiction to try this case on its merits, and the Court of Appeals of Virginia so found in its written opinion of April 6, 1988.

Under the Virginia Code § 20-108, the Virginia courts have continuing jurisdiction in matters on which they have previously ruled. Such was the situation in *Etlin v. Etlin*. Under Code Section 20-126(A)(2) the Virginia court retains modification jurisdiction even when the child no longer lives in the state. *Kern v. Lindsey*, 30 S.E. 2d 707, 182 Va. 778 (Va. 1944). Modification jurisdiction continues as long as the elements contained in Virginia Code § 20-126(A)(2) are present. That Code section provides that a court is competent to decide child custody matters and has jurisdiction to make child custody determinations if:

> "It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . ."

The Circuit Court of Fairfax County and the Court of Appeals agreed that there were significant connections with this State and that Virginia was the proper state in which this hearing should be conducted. The father, Vladimir N. Etlin, has always resided in the State of Virginia and continues to reside there. The Petitioner, Mrs. Etlin, had been a Virginia resident, then moved to Maryland while the earlier divorce proceedings were in progress in the Circuit Court of Fairfax County, Virginia, before she surreptiously disappeared from the Met-

ropolitan area entirely in 1982 with the child, Daniel Etlin.

That child, Daniel Etlin, was born in Virginia and lived the early part of his life in Virginia. Moreover, the child's paternal grandparents and many other relations live in Virginia.

Starting in 1980, the parties litigated custody, support and issues relating thereto, as well as obtaining their final decree of divorce from each other in the County of Fairfax, State of Virginia. This process was over two years in the making before her abduction of Daniel.

Mr. Etlin now has physical custody of Daniel Etlin and lives in Fairfax County, Virginia. Moreover, much of the evidence relating to the child's present or future care, protection, training and personal relationships is found in the State of Virginia.

These connections support the Court's jurisdiction in this case. *Meade v. Meade*, 812 F.2d 1473 (4th Cir. 1987).

Under the Uniform Child Custody Jurisdiction Act of Oregon (UCCJA), ORS 109.700, *et seq*, and The Parental Kidnapping Prevention Act (PKPA), 28 USC § 1738A, Oregon could not retain jurisdiction of this case. The public policy of these laws, as well as the UCCJA of Virginia, are designed to prevent the absconding parent from forum shopping and benefiting from their own wrongdoing.

Judge Redding of the Circuit Court of Multnomah County in Oregon, after consultation with Judge F. Bruce Bach of the Fairfax County Circuit Court, also agreed that Virginia has jurisdiction in this matter and sent the case back from Oregon to Fairfax County, Virginia for trial. (Petitioner's Appendix Vol I pp. 183-197 of conversation on 2/17/87).

Clearly, Virginia had jurisdiction in this matter, and the decision below was correct.

2. The Court of Appeals of Virginia found that the mother's contempt conviction was not properly before the Court. Virginia Code Section 19.2-318 provides that an appeal from a judgment of criminal contempt must be sought by a Petition for Writ of Error. No such Petition was filed and the Court of Appeals would not consider the merits of the issue.

Code Section 19.2-318:

> "From a judgment for any civil contempt of court an appeal may be taken to the Court of Appeals. A Writ of Error shall lie from the Court of Appeals to a judgment for criminal contempt of court . . ."

Further Code Section 19.2-320 provides:

> "Any party for whom a Writ of Error lies may apply therefor by complying with the provisions of the rules of the Supreme Court of Virginia relative to the appeal of criminal cases to the Court of Appeals, or where an appeal is taken to the Supreme Court, with the rules of the Supreme Court relative to an appeal of criminal cases to the Supreme Court."

And Code Section 12.2-321:

> "A. The petition to the Court of Appeals *shall* [emphasis added] be filed with the Clerk of the Court in the manner and within the time provided by law."

As these Code sections make clear, the Petitioner waived her right to file for a Writ of Error, and therefore as the Court of Appeals so found the issue of her criminal contempt was not considered.

Petitioner failed to perfect her State Appellate rights.

CONCLUSION

The Respondent in this case asks that the Petition for a Writ of Certiorari be denied and that Respondent be awarded his costs and damages.

Respectfully submitted,

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May, 1989

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 88-1504

Michelle M. Etlin, Petitioner,

v.

Vladimir N. Etlin, Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIARY COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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May 8, 1989

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 1 of the U.S. Constitution provides, in pertinent part:

"Full faith and credit shall be given in each State to the...judicial Proceedings of every other State."

28 U.S.C. 1738A provides, in pertinent part:

[See Supplemental Appendix, p. i]

The Fourteenth Amendment to the U.S. Constitution, Section 1 provides, in pertinent part:

"No state shall ... abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

As mentioned in the Petition, the custody decree entered on March 4, 1988 nunc pro tunc June 2, 1982 was appealed to the Court of Appeals of Virginia on the grounds that the Circuit Court lacked jurisdiction to make it and had no legal basis to remove, replace, modify, supersede, or in any way disturb the valid custody decree already entered. [See Supplemental Appendix, pp. ii-v.] The Father's brief merely asserted that the issue of whether or not the court lacked jurisdiction was **moot**, which mother denied. [See Supplemental Appendix, pp. v-vi.] Her claim to back child support remained in active controversy; also the mother remained under suspended sentence for criminal contempt of the order, so its validity was still in controversy.

Another effect the mother identified which still flowed from the June 2, 1982

decision was that the court had exercised "continuing jurisdiction" in 1987. She argued that she was deprived of due process if jurisdiction could "continue" from a point at which it did not exist. U.S. Constitution, Fourteenth Amendment.

Between the filing of the Petition and now, a new development occurred: the Court of Appeals (to which certiorari is requested) affirmed the nunc pro tunc order by an extraordinary feat of irrationality. First, granting that the reduction of child support **was** still in controversy, it disposed of that issue by saying such reduction was not proven "plainly wrong." Turning to jurisdiction second, as if invalidity of an order did not affect trial court discretion, it held the rest of the order moot and thus affirmed; rehearing was denied. [See **Supplemental Appendix**, pp. vi-vii.]

ADDITIONAL REASONS TO GRANT THE PETITION

I. The Voidness of the Nunc Pro Tunc Order Proved that Virginia Lacked Jurisdiction under 28 USC 1738A

The Court of Appeals of Virginia, affirming the trial court, said it had jurisdiction pursuant to 20-126(A)(2), or "significant connections." Even if that were so, Virginia state law could not by itself give rise to jurisdiction to decree concerning a child living in Oregon for four years. Virginia could only decree in 1987 if it had "continuing jurisdiction" pursuant to 28 USC 1738A.

Continuing jurisdiction under the Federal Act is predicated upon, and corollary to, full faith and credit to custody decrees. U.S. Constitution, Article IV, Section 1. Ever since May v. Anderson, 345 U.S. 528, 73 Sup. Ct. 840 (1953), this Court has questioned full faith and credit for custody decrees, which are inherently non-final. However,

28 USC 1738A has provided the constitutional groundwork for full faith and credit to such decrees: compliance with the jurisdictional prerequisites of the Act.

In other words, if a state exercises jurisdiction in accordance with 28 USC 1738A, and thereby makes its decree in compliance with that Act, then its decree qualifies for full faith and credit out of state. Furthermore, if that custody decree does qualify for full faith -and credit out of state, the Decree State that made it can qualify for continuing jurisdiction to decree again. This relationship between full faith and credit for custody orders, and continuing jurisdiction for the courts of the decree state, is the foundation of 28 USC 1738A. Rendition of custody decrees contrary to the requirements of the Federal Act cannot lead to the continued right to decree pursuant to that same Act.

In the petition for certiorari, the mother asserted that, because Virginia could not satisfy its own statutory jurisdictional requirements, it could not assume jurisdiction under the Federal Act. She points out here in addition that Virginia could not, in 1987, continue to have jurisdiction which it lacked five years earlier, when it made orders which violated 28 USC 1738A.

From and after June 2, 1982, the date of the nunc pro tunc decision, Virginia did not have jurisdiction over the subject matter of Daniel Etlin's custody. According to 28 USC 1738A:

> "The jurisdiction of a court of a State which **has made a child custody determination** consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met **and** such State remains the residence of the child or of any contestant.

That does not apply to Virginia, which made a child custody determination in-

consistently with the provisions of the Federal Act in 1982, thereby depriving itself of jurisdiction to continue ruling. Templeton v. Witham, 595 F.Supp. 770 (S.D.Ca. 1984) vacated on other grounds, 805 F.2d 1039 [1]. (In Templeton, the Court held that rendition of a custody order which violated the terms of 28 USC 1738A caused a mandatory **lapse** of jurisdiction for the Decree State.)

The importance of this nexus cannot be overestimated, in assessing the public interest and this Court's interest in upholding and interpreting the Federal Act. That Act attempts to provide jurisdictional integrity for custody decrees to limit inappropriate and unnecessary exercises of jurisdiction to disturb valid

---

1/ Templeton was vacated by the Ninth Circuit not on the merits of the decision but because, ever ahead of its time, the Ninth Circuit correctly perceived that 28 USC 1738A did not give rise to a private cause of action in federal court.

custody decrees. The fact that it is used as often to justify such proceedings as to prevent them has led to a situation so chaotic that this Court should exercise jurisdiction to define the Federal Act's requirements. Although Etlin v. Etlin is an atrocious individual case, it is not its atrocity that merits U.S. Supreme Court certiorari, but the fact that it presents an ideal opportunity for this Court to make important public policy statements which will help the several states. As bizarre and convoluted as the procedural elements of Etlin are, it is not a mere aberration; it is just the "worst case" among many of the same species begging for the guidance of U.S. Supreme Court review.

II. The Issues are Far-Reaching

A U.S. Supreme Court decision in this case can affect more of America's population than any case before the

Court for years--with the sole possible exception of the abortion issue. "War of Attrition" litigation is becoming a common state court phenomenon, aggravated, rather than ameliorated, by 28 USC 1738A--because the Act is being misapplied.

Cases like Etlin are actually quite common (minus some of the more peculiar procedural anomalies such as the lawsuit against the judge and the four pro se trips the father made in forma pauperis to this Court). Such abusive lawsuits are analogous to iatrogenic illnesses--one could call them "lexogenic litigations"--and they are ever on the rise.

CONCLUSION

The recent development--the illogical action of the Virginia Court of Appeals in refusing to vacate a void custody decree--adds weight to the Petition to this Court to review that court's treatment of an important mis-

application of 28 USC 1738A. The constitutional violations are even more egregious, and the impropriety of Virginia's exercise of jurisdiction even more apparent, in light of the nunc pro tunc 1982 order's invalidity--not just under state law, but under 28 USC 1738A.

The fact that Virginia did exactly what the Federal Act was enacted to prevent, and then presumed to exercuse "continuing jurisdiction" to do it again five years later, is a glaring example of the problems arising in state appellate courts absent U.S. Supreme Court attention.

Respectfully submitted,

Michelle Etlin

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Dated: May 8, 1989

SUPPLEMENTAL APPENDIX

28 USC 1738A provides as follows, in pertinent part:

§ 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

* * *

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

* * *

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the [parties].

Excerpts from Appellant's Brief in the Court of Appeals of Virginia, Record No. 0437-88-4:

"After a full ore tenus hearing, the Circuit Court (Lewis Hall Griffith, J.) awarded sole custody to Michelle ... in a permanent custody order dated February 26, 1981 (App, 15-17). Vladimir then sued Judge Griffith for $35,000 (App, 18-23), ... coerced [his] recusal by motion ... not served on Michelle (App, 24), and simultaneously disobeyed that order.

* * *

"On February 5, 1982, Vladimir filed a 'motion to set aside court order' with no petition pending pursuant to §20-108 and no jurisdictional pleading pursuant to §20-132. ... On June 1, 1982, the parties appeared ... on the father's motion to 'set aside' the permanent custody order for 'fraud on the court.'

"Vladimir alleged no change in circumstances but insisted that ... Judge Griffith had made the wrong decision ... therefore, Judge Bach must reverse him.

* * *

"... Judge Bach announced that he would hear custody, visitation and support de novo ... explaining:

'If I think the previous orders were wrong, or shouldn't have been entered, I'll change it because I think we have jurisdiction over custody and visitation.' * * * 'I'm going to [try the case again] in spite of [the mother's] technical objections ... and notice or anything else because ... custody and visitation can be reviewed and changed at any time. ...

* * *

"Judge Bach then found that there had been no fraud on the court, but he proceeded to set aside Judge Griffith's order anyway and to make his own ..."

[pages 4 - 7, Appellant's Brief.]

"In order for custody decrees to be Constitutional and to merit full faith and credit, they must be final. Yet Sec-

tion 20-108 makes it clear that they are not final. The fragile but essential characteristic of custody decrees that allows them to be final and yet changeable according to Section 20-108 is that they may only be changed if material circumstances change. It would be unconstitutional to deprive a custodial parent of the protection of a custody decree when the only thing that changed was the judge. ... If [the recusal of] Judge Griffith could deprive Michelle of the right to the protection of Judge Griffith's decree, or could force her to relitigate her entitlement under that decree, then the custody law of Virginia would automatically be unconstitutional, because it would deprive persons of equal protection and due process. [Id. at 13]

* * *

"It would deprive persons of due process and equal protection if, once a

final order was made in the Circuit Court, the order was enforceable only until the next trial, which could occur at any time, before any other tribunal, who was free to change the order and set the order aside. ... Section 20-108, if interpreted to mean that custody can be changed at any time, would ... be ipso facto unconstitutional." [Id. at 27]

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Excerpts from Appellant's Reply Brief in the Court of Appeals of Virginia, Record No. 0437-88-4:

"A void order has no legal or binding force or effect, and all proceedings based upon it are invalid. [citations omitted] If nothing were based upon the June 2 order, if there were no continuing jurisdiction, if Judge Bach had not enforced his void order both in and out of the Commonwealth, the issue of contempt of a void order would still remain.

[Reply Brief, p. 4]

"... because the original order was void, all subsequent actions based upon its effects were also void for lack of jurisdiction. ... because the initial order was void, ... continuing jurisdiction could not attach to an invalid order. [Id. at 9-10]

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V I R G I N I A :

In the Court of Appeals of Virginia on Thursday the 23rd day of March, 1989.

Michelle M. Etlin, Appellant,
against
Record No. 0437-88-4
Circuit Court No. 68775
Vladimir N. Etlin, Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Fairfax County on the 4th day of March, 1988, nunc pro tunc June 2, 1982.

Before Judges Hodges, Keenan and Moon

The order appealed from in this case is affirmed for the following reasons:

(1) The record before this Court fails to demonstrate that the chancellor was plainly wrong in reducing Mr. Etlin's child support obligation on June 2, 1982. Code §8.01-680.

(2) The remaining issues presented on this appeal contain no matters which remain in active controversy, and therefore, the balance of the appeal filed herein is moot.

Accordingly, the judgment is affirmed. The appellant shall pay to the appellee thirty dollars damages.

This order shall be certified to the trial court.

A copy,

Teste:

David B. Beach, Clerk

By: Deborah S.F. Uitvlucht
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 88-1504

Michelle M. Etlin, Petitioner,

v.

Vladimir N. Etlin, Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIARY COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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May 24, 1989

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Appellee Vladimir Etlin ("Father") presented "questions" in his brief in opposition that in fact illuminate certain points which may serve to make certiorari more attractive. First, Father asks if there was "sufficient evidence" to support the trial court's finding that it had jurisdiction to determine Daniel's custody, where Mother "willfully absconded with the four year old child of the parties in October 1982 and remained secreted until being discovered [in Oregon] in ... 1986." (Appellee's brief, p. (i)) This question reveals that the jurisdictional prerequisites of 28 USC 1738A did not guide the Virginia Court's decision on jurisdiction; it was, rather, the Mother's conduct which influenced the decision of the Court. Appellee goes on to concede that the Federal Act was not accorded its legal preemptive effect, asking, "Is there a federal question as to

the applicability of [28 USC 1738A] where the state laws of Virginia controlled continuing jurisdiction of Virginia's Circuit Court and custody questions and when the evidence was sufficient to support jurisdiction?" [emphasis supplied] Appellee tries to ignore the applicability of the Federal Act which governs the several states' determinations and exercise of jurisdiction in interstate cases. Insisting that there is no federal question, Appellee blindly asserts that state law governs.

As to Appellee's other "question," i.e., that Petitioner failed to perfect her appellate rights, he has likewise not responded to the Petition.

JURISDICTION

The Father's brief set forth an unsupported conclusion that there was evidence sufficient to support the trial court's finding that it had jurisdiction.

He did not however address the significant connections issue, or the fact that the several states have no uniform understanding of its parameters. He tried instead to argue the merits, saying that Daniel had relatives in Virginia, etc. In fact, the question:

"Do the presence of relatives in a state and the fact that a child resided there 6 years ago constitute significant connections for purposes of 28 USC 1738A?"

<u>is</u> a federal question. And Appellee's assertion that Virginia law governs jurisdiction <u>is</u> the point Mother made in her Petition: the states are ignoring the uniformity and order the Federal Act seeks to impose; they are doing now what they did ten years before the Federal Act was passed--deciding each case on individual facts which, in any trial court's opinion, may justify the exercise of jurisdiction (such as the fact that Mother disobeyed the judge who was then desirous of jurisdiction to punish her). In each

case the facts are different, the judge is different, and the decision comes out different. Jurisdiction remains, as Petitioner said, "a roll of the dice."

Appellee has not shown that the exercise of jurisdiction by Virginia was more legally sound than a roll of the dice; he has simply reiterated the trial court's view that the Father rolled better dice--precisely the situation for which Petitioner sought certiorari. The fact that VA Code 20-108 gives Virginia "continuing jurisdiction" does not delegitimize the Federal Act's preemptive powers. It only shows that many states still rule as if there is no Federal Act, no Uniform Code, no Constitution.1/

1/ Appellee in fact cites Meade v.Meade, 812 F.2d 1473 (4th Cir. 1987), a case decided in the Federal Courts before the U.S. Supreme Court made it clear that 18 USC 1738A did not give rise to a private cause of action therein. The points about Appellee thus citing Meade are twofold: (1) Meade was not decided on

(continued...)

CONTEMPT

The trial court herein entered an order on March 25, 1987. On page 6 of that order, it held Mother in contempt and sentenced her. That order was entered in the civil case under Chancery 68775. There was and is no criminal case entitled Commonwealth v. Michelle Etlin. Michelle Etlin was never charged with a crime in Virginia or anywhere else.

Mother took the order up on appeal timely and paid for it--into the Court of Appeals of Virginia, to which certiorari is sought. She perfected her appeal and

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1/(...continued)
the notion that the state law governed, but on the notion that the Federal Act governed, contrary to Appellee's assertion--in fact, it could not have been a Fourth Circuit case if there was no federal question presented; (2) Meade is one of the cases in which the states made widely divergent decisions about what constituted "significant connections," exactly the federal question Petitioner submits, exactly the federal question the several states are having such difficulty interpreting.

briefed it. This was an appeal of right in a relatively new court. (That court had previously heard the appeal of another criminal contempt conviction and had reversed, as Mother showed in her Petition and below.) One trial was held--by Court, not by jury. Contempt was not prosecuted by the Commonwealth Attorney. The result was one order, entered March 25, 1987, and signed once, by Judge F. Bruce Bach. One appeal was taken.

Yet the Court of Appeals, to which certiorari is prayed for, refused to hear it because it insisted, in effect, upon two separate appeals of the one order: a civil appeal of pages 1-5 and a writ of error for page 6. And Appellee asserts that this is "not just procedural."

It is obvious that due process can not require a person to stand trial in a chancery proceeding and then deny her appeal of the resulting order under the

theory that part of it is "criminal" and follows different rules!

Appellee's bald, unsupported, conclusory statement that "Code Sections 19.2-318, 320 and 321 are substantive and not just procedural" [Appellee's brief, page 4] is an unreasonable and meaningless statement. Those statutes are procedural only, and manifestly so. Writ of error requires the same fundamental assignment of error as appeal. Appeal in fact includes writ of error. Perfection of appeal and writ of error are substantively the same. All elements of a writ of error are present on appeal. Most important, Virginia caselaw shows that writ of error is the material equivalent of appeal, so there is no rational explanation for the claim that requirement of writ of error instead of appeal is "substantive." It is, in fact, in Appellee's own words, "<u>just procedural</u>."

Furthermore, it is obvious from Appellee's citation of 19.2-320 that there is no substantive difference between appeal and writ of error in this case:

"Any party for whom a Writ of Error lies may apply therefor by complying with the provisions of the rules of the Supreme Court of Virginia relative to the appeal of criminal cases to the Court of Appeals ..." [Appellee's brief, p. 7] [emphasis supplied]

This was a civil case. The order was entered, and even now resides, in the civil order book. Hearing was set on the civil docket. The rules of the Supreme Court of Virginia relative to the appeal of civil cases to the Court of Appeals were followed by Petitioner. Petitioner did not waive her right to appeal. The Court of Appeals of Virginia should be reviewed for denying substantive due process.

CORRECTIONS

Petitioner wishes to correct several misstatements in Appellee's brief--and at

the same time, to point out that the content of these misstatements, not 28 USC 1738A, guided the Courts below. First, Appellee states on page 6 that there is significant evidence in Virginia concerning Daniel. There was no such evidence when the order was made. Second, Judge Redding did not, as Appellee claims on page 6, send the case back from Oregon. Father kidnapped Daniel contrary to Oregon law. Judge Redding never "agreed" to anything because he was never consulted. The Father seized physical possession of Daniel and Judge Bach chose to hear the case. Neither circumstance was contemplated by or consistent with the provisions of 28 USC 1738A. As to the decision below being "correct," as Appellee asserts on page 7, that would go to the merits, not the questions presented for certiorari.

CONCULSION

Appellee has basically agreed that the case presents the federal question of the states' attempts to ignore 28 USC 1738A when it interferes with their own jurisdictional agendas. He shows moreover that there was no viable reason for the Court of Appeals of Virginia to refuse to hear Petitioner's appeal on the issue of contempt. This Court should grant certiorari to instruct the states in cases like Etlin v. Etlin.

The Appellee, who four times approached this Court in forma pauperis, should not be "awarded his costs and damages."

Respectfully submitted,

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